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Defending the F-Word: Freedom!

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Freedom!¹

Our legal system has always treated sexual expression with singular hostility, relegating it to second-class status under the First Amendment. This discriminatory treatment reflects a broader cultural pattern, which was well captured by Susan Sontag when she wrote, "Since Christianity . . . concentrated on sexual behavior as the root of virtue, everything pertaining to sex has been a 'special case' in our culture, evoking peculiarly inconsistent attitudes."² Accordingly, to borrow again from Sontag, "expression pertaining to sex has been a special case in our law, evoking peculiarly inconsistent rulings."

The First Amendment's Free Speech Clause is written in unqualified language, barring any "law . . . abridging the freedom of speech."³ It makes no exception for speech about sex. However, the Supreme Court has consistently read such an exception into the First Amendment. It has allowed sexual speech to be restricted or even banned under circumstances in which it would not allow other types of speech to be limited.⁴

Overall, American law is the most speech-protective in the world. The U.S. legal system protects many kinds of speech that are widely considered offensive or dangerous, including those that are outlawed in other advanced democracies, such as hate speech,⁵ defamatory falsehoods about government officials,⁶ and the advocacy of violence and

lawbreaking.⁷ In contrast, American law singles out for suppression sexual expression, a type of speech that is protected under many other legal systems.⁸

As an activist, I am congenitally an optimist, so I want to stress that there have been some positive legal developments in this area in recent years, and there are also important ongoing law reform initiatives, led by the ACLU, along with many diverse allies. I will save the details of that upbeat assessment of future trends for later, so I can end on a positive note! Before then, I will address three other major points. First, I will cite some examples of our legal system's ongoing assault on sexual expression. Second, I will outline the general free-speech principles that strongly protect expression with any other content (other than sexual) to highlight the discriminatory double standard for sexual expression. Third, I will summarize the three major speech-suppressive doctrines that the Supreme Court has concocted to rationalize three major types of restrictions on sexual expression. And then, fourth and finally, I will explain the positive constitutional law developments to which I referred above.

1. Our legal system's ongoing assault on sexual expression

Starting in 2004, we saw dramatic new crackdowns on "indecent" in broadcasts in response to the now infamous "wardrobe malfunction"⁹ during the televised 2004 Super Bowl halftime show.¹⁰ These new measures are so extreme that they even have been condemned by some former officials of the Federal Communications Commission (the "FCC") itself, even though these officials had supported prior FCC limits on broadcast indecency.¹¹ Yet even these former policemen of the airwaves felt compelled to denounce the recent repression as "a radical . . . censorship crusade that will . . . chill . . . all but the blandest . . . program fare."

Since the Super Bowl brouhaha in 2004—which one journalist memorably called "a tempest in a B-cup"¹²—the FCC has imposed record-breaking fines on broadcasters, even for the fleeting, spontaneous use of a single word in a clearly non-sexual context. For example, the FCC condemned a documentary film about blues musicians, which was produced by Martin Scorsese and broadcast by an educational television station, because one or more of the artists being interviewed uttered what the FCC coyly calls "the F-word" or "the S-word."¹³ The FCC even ruled that the news program *The Early Show* had committed "indecenty"

through one use of the word "bullshitter"; the FCC stressed that its censorial regime contains "no . . . exemption [for news]."¹⁴

As if all of the FCC censorship has not been bad enough, in 2005 Congress passed a repressive new federal law that vastly increases the fines for broadcast indecency—by a factor of 10.¹⁵ Under this new Broadcast Decency Enforcement Act, the use of one four-letter word, even in a clearly non-sexual context, can trigger a fine of \$325,000. Small, nonprofit broadcasters would be bankrupted by such huge fines. Therefore, to avoid them, many broadcasters have pulled many valuable programs.¹⁶ For example, a PBS station cancelled a historical documentary about Marie Antoinette because it contained sexually suggestive drawings.¹⁷ Likewise, CBS affiliates pulled a documentary about the 9/11 terrorist attacks just because it included actual footage of shocked onlookers watching the Twin Towers crashing down.¹⁸ Not surprisingly, many of them were exclaiming in horror, but the documentary never aired because some of the horrified exclamations included four-letter words. Given the government's zero-tolerance policy toward isolated expletives, a Vermont public radio station even barred a United States Senate candidate from a political debate.¹⁹ The station manager feared that the candidate might do on air what he had done during a previous live debate; he had lost his temper and called two audience members "shits."²⁰

The recent attacks on sexual expression have not been limited to broadcasting. For example, the federal law suppressing online material that any local community deems "harmful to minors," which the ACLU had fought for more than a decade, concluded its circuitous journey through the federal court system in 2009 and was finally pronounced dead under the First Amendment. This law was the badly misnamed the Child Online Protection Act or COPA.²¹ It was "badly misnamed" because, far from protecting children, it potentially criminalized any online expression that contained any sexual content, ranging from Planned Parenthood's information about contraception to artistic websites that display nude paintings or sculptures. Both the lower court and the intermediate appellate court ruled that the law was unconstitutionally overbroad and vague, outlawing significant expression that the First Amendment clearly protects.²² Even the trial judge in that case noted that blocking young people's access to such material may well do them more harm than good.²³ I stress that *even* this judge took this position because he is a conservative Republican, who was appointed by a conservative Republican president,²⁴ as was the judge who wrote the intermediate appellate court opinion affirming the trial judge's ruling.²⁵

These facts illustrate an important point that contravenes common stereotypes. When it comes to freedom of speech, including for sexual expression, both support and opposition cut across all party and ideological lines.²⁶ That is one reason the ACLU always has been staunchly non-partisan, never supporting or opposing any official or candidate, but instead praising or criticizing them on an issue-by-issue basis.²⁷ All politicians are positive on some civil liberties issues and negative on others. When it comes to sexual expression, the major division is not between Democrats and Republicans or between liberals and conservatives. Rather, the major division lies between, on the one hand, elected officials and, on the other hand, officials who are relatively sheltered from the political process and its majoritarian pressures: federal judges.

This pattern is illustrated by the recent censorial laws and regulations I noted above. In 2006, the new federal law that cracks down on broadcast “indecentcy” was passed by overwhelming margins in both houses of Congress.²⁸ In fact, *not a single* Senator voted against it, while in the House, only 35 brave souls voted no. Likewise, all five members of the FCC strongly supported that censorial new law, as well as the recent record-breaking fines on broadcasters.²⁹ In contrast, though, just as elected officials and their FCC appointees have supported broadcast censorship across the political spectrum, the opposite is true of federal judges. Fortunately, federal judges have opposed such censorship across the political spectrum.³⁰

The same pattern has emerged in decisions regarding censorship of online sexual expression. In recent years, Congress passed two such cybercensorship laws,³¹ with almost no opposing votes on either side of the aisle.³² Former presidents Bill Clinton and George W. Bush both defended these laws in the courts against the ACLU’s constitutional challenges. In contrast, of the dozens of federal judges who ruled on these cybercensorship laws, almost every single one ruled in the ACLU’s favor, voting to uphold freedom of online sexual expression and striking down these repressive laws.

Other recent assaults on sexual expression have occurred outside the legislature and courtroom and have slipped largely below the public radar screen. For example, President Bush’s first Attorney General, John Ashcroft, was well-known for his commitment to eradicating sexually oriented expression from our lives, even going so far as to spend \$8,000 of our tax dollars to buy drapes to cover an artistically acclaimed Art Deco statue in the Justice Department’s main hall just because this toga-clad female figure had one exposed breast!³³

Most people are unaware that Ashcroft’s successor, Alberto Gonzales, outdid his predecessor in targeting sexual expression. After Gonzales became Attorney General in 2005, he announced in his very first major public address that the Justice Department would step up its enforcement efforts against such expression.³⁴ Gonzales told the National Press Club that he was creating a top-flight obscenity prosecution task force, which “will be staffed with our best and brightest.”³⁵ Notably, this move drew widespread criticism from Justice Department lawyers³⁶ and law enforcement officers,³⁷ who resented the reallocation of personnel and other resources from other areas that they considered more urgent than preventing consenting adults from viewing images of other consenting adults. One such critic, the U.S. Attorney in Miami, was forced by Gonzales’ new initiative to remove agents from child endangerment cases, in which actual children had been physically abused, to reallocate these agents to cases involving sexual images produced by and for adults.³⁸ As one FBI agent said, “I guess this means we’ve won the war on terror. We must not need any more resources for espionage.”³⁹ In the same vein, a leader of the American Bar Association said, “Compared to terrorism, public corruption, and narcotics, [pornography] is no worse than dropping gum on the sidewalk.”⁴⁰

U.S. Attorneys who aggressively pursued obscenity cases (even those that were quickly thrown out of court) were promoted within the Bush Justice Department, while at least two U.S. Attorneys were reprimanded and even fired because they did not want to deploy their limited resources to fight obscenity cases. A U.S. Attorney from Nevada was pressured to pursue an obscenity case he described as “woefully deficient”; he did not want to reassign to it prosecutors who were working on public corruption and violent crime cases, and he was ultimately fired after resisting Bush Administration demands.⁴¹

Prime targets of Gonzales’s renewed War on Obscenity were images of bondage and sado-masochistic sex.⁴² That provoked a commentator on Salon.com to observe, “Many Americans would likely find such pornography appalling. But shouldn’t they be far more appalled by the fact that the man now focused on eradicating staged acts of torture was the same one who set the stage, as Bush’s counsel, for real acts of torture at Abu Ghraib prison in Iraq?”⁴³

While there have been no publicized federal examples of such censorial behavior since the Obama Administration took office, state officials continue to engage in similar acts of sexual censorship. In 2010, when Bob McDonnell became Governor of Virginia, his Attorney General ordered new lapel pins of the state’s official seal for his staff because

he believed the woman depicted on the seal should have “more modest attire.” The original state seal, which since 1776 had pictured the Roman Goddess Virtus with her left breast exposed, was replaced with a new rendition that covered the breast with an armored plate.⁴⁴

II. General free-speech principles that strongly protect expression with non-sexual content should be extended to sexual speech

The starting point for understanding freedom of speech is, of course, the “Free Speech Clause” of the First Amendment to the U.S. Constitution.⁴⁵ In sweeping, unqualified terms, it declares that the government “shall make no law abridging the freedom of speech.” It does not limit that guarantee to speech about certain topics. In fact, it does not recognize any exceptions at all. In this sense, our constitutional right to free speech is strikingly different from the counterpart provisions in other countries’ constitutions.⁴⁶ These other constitutions *do* expressly limit free speech in certain circumstances, including for the promotion of public morals,⁴⁷ yet our First Amendment framers deliberately rejected such limiting language.

Conservative judges and politicians often stress that the Constitution should be interpreted according to its plain language and original intent.⁴⁸ They accuse liberal judges of being “activists” by reading additional meanings into the Constitution’s own terms or by departing from the intent that those terms reveal.⁴⁹ But in relation to the Free Speech Clause, the judicial activists are all the judges who have read into its straightforward language various unwritten limits, even though the framers deliberately chose *not* to include any. And the “activist” judges who have rewritten the Free Speech Clause in this way include many conservatives.⁵⁰ It bears repeating that support for free speech crosses ideological and party lines. However, the same is true of opposition to free speech. Almost everyone advocates reading *some* limits into the Free Speech Clause, for the expression of whatever ideas *they* personally consider offensive, evil, or otherwise inconsistent with their own deeply held beliefs. Journalist Nat Hentoff well captured this pattern in the title of one of his books: *Freedom of Speech for ME, but not for THEE; How the Left and Right Relentlessly Censor Each Other*.⁵¹ A writer for the *Los Angeles Times* also summarized this idea very well when he wrote, “The urge to censor is the most fundamental human drive—far more basic than the sex drive.”

At the heart of the Supreme Court’s extensive free-speech rulings are two key principles. The first of these principles specifies what is *not* a sufficient justification for restricting speech, and the second prescribes what is a sufficient justification. These principles have been widely accepted by Justices across the ideological spectrum, and they have well served both individual liberty and our democratic society. There is no justification for not extending them to sexual expression, as many judges and scholars have advocated.

The first of these basic principles requires “content neutrality” or “viewpoint neutrality.” In essence, the government may never limit speech just because the viewpoint it conveys is considered offensive or otherwise negative by any person or group, even if such group consists of the vast majority of the community.⁵² Consistent with this core principle, the Court has protected speech that conveys ideas that are deeply offensive to most Americans, including burning an American flag⁵³ or burning a cross.⁵⁴ The content-neutrality principle reflects the philosophy that the appropriate response to speech that you find offensive or negative in any way is not censorship, but rather either ignoring it or answering back. The Supreme Court described that first option in a recent case that, notably, rejected restrictions on sexual expression on cable TV. The Court said, “Where the [intended] benefit of a content-based speech restriction is to shield the sensibilities of listeners, the . . . right of expression prevails. . . . We are expected to protect our own sensibilities simply by averting [our] eyes.”⁵⁵

In contrast, the second general principle of speech regulation states that the government *may* regulate speech if the regulation is necessary to promote some extremely important goal, such as preventing imminent physical harm.⁵⁶ This can be illustrated through the flag-burning example. If a protestor is burning a flag in a place where it causes an imminent danger of spreading the fire, then the government may stop that particular flag burning. This principle is often summarized by saying that the government may limit speech that poses “a clear and present danger”⁵⁷ of some tangible harm. But speech still may *not* be restricted because of some more remote or speculative harm. In other words, government may not restrict speech on the ground that it (i) *might* cause or lead to some (ii) *intangible* harm, such as offended feelings.⁵⁸

Let me explain each of those two key limits on the government’s power to regulate speech. First, if we allowed speech to be curtailed on the speculative basis that it *might* indirectly lead to some possible harm, free speech as we know it would cease to exist. That is because *all* speech *might* lead to potential danger sometime in the future. Jus-

tice Oliver Wendell Holmes recognized this fact when he observed that “[e]very idea is an incitement.”⁵⁹ If we banned all ideas that might lead individuals to actions that might have an adverse impact on important concerns, such as safety, then scarcely any idea would be safe, and surely no idea would be safe that challenged the status quo. This point was stressed by a respected conservative federal Judge, Frank Easterbrook, in an important opinion that struck down a law seeking to punish certain sexual expression that many people consider offensive and that many believe has the potential to cause serious harm at some future time.⁶⁰

Specifically, some advocates of women’s rights have sought to ban certain sexual expression on the ground that it degrades or demeans women; hence, they believe that this “pornography,” as they call it, endangers women’s safety and equality.⁶¹ The City of Indianapolis passed a law reflecting this belief in 1984.⁶² The Indianapolis law defined illegal “pornography” as sexually oriented expression that “subordinates” women. It was immediately challenged by First Amendment advocates and advocates of women’s rights.⁶³ Notably, the law’s opponents—including Yours Truly—believed not only that it would violate the fundamental free-speech principles that I have been discussing, but also that it would do more harm than good for women. The law even suppressed sexually oriented expression that is essential for women’s rights, such as expression about women’s sexual and reproductive health. Every judge who ruled on the law agreed that it did violate the core free-speech principles at stake.⁶⁴

In the most extended opinion, Judge Easterbrook assumed for the sake of argument that the law’s proponents correctly believed that “depictions of subordination [may] perpetuate subordination.” However, he explained that if this were enough to justify suppressing speech, then there would be no free speech left because so much speech has the same potential negative influence. As he wrote:

Efforts to suppress communist speech in the U.S. were based on the belief that [it] would increase the likelihood of totalitarian government. . . . The [1798] Alien and Sedition Acts . . . rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution—a belief with support in the history of many nations. Racial bigotry, anti-Semitism, violence on television, reporters’ biases—these and many more influence the culture and shape our socialization. . . . Yet all is protected as speech, however insidious. Any other

answer leaves the government in control . . . the great . . . director of which thoughts are good for us.⁶⁵

Now I will briefly explain why government may not suppress speech based on intangible harms such as hurt feelings. First, it is important to note that the cardinal free-speech rule that Judge Easterbrook laid out does not at all reflect disrespect for the seriousness of these psychic or emotional harms. Contrary to the old nursery rhyme “Sticks and stones may break my bones but words will never hurt me,” words *do* wound, especially when they insult some core element of our identities, such as race, gender, sexual orientation, and so forth. The reason we do not let government suppress speech to prevent these very real psychic or emotional harms is well summed up by another old saying, “The cure is worse than the disease.” Hearing offensive and upsetting expression is the lesser of two evils for both society as a whole and individuals. Far worse would be empowering the government, or a majority of our fellow citizens, to take away our individual freedom to make our own choices about what we say and what we see or hear.

To highlight the second-class status to which sexual speech has been relegated under the First Amendment, we can look at just one of the Supreme Court’s many cases that abide by the two general speech-protective principles I have just summarized. The Court consistently protects non-sexual expression no matter how offensive and upsetting it is to those who are exposed to it. If these same speech-protective principles were applied to sexual expression, the Supreme Court would strike down anti-obscenity laws, as well as restrictions on broadcast indecency, instead of upholding these suppressive measures as it has done in the past.

Cohen v. California,⁶⁶ decided in 1971, is possibly the Court’s most important precedent concerning constitutional protection for offensive speech in general—that is, non-sexual offensive speech. The *Cohen* Court held that the F-word in the title of this essay—“Freedom”—extends to what the FCC means by the “F-word”—the one with four letters. So the FCC’s recent crackdown on that F-word, in broadcasts, is completely contrary to the *Cohen* case. The FCC crackdown, as well as the new federal statute censoring broadcast “indecency,” rests on the very debatable view that speech should receive less protection when it is conveyed by the broadcast media than when it is conveyed by other media. This view goes back to the Supreme Court’s ruling in a controversial 1978 case involving Pacifica Radio.⁶⁷ I will say a bit more about

that case in the next section of this essay. In this section, though, I will continue to discuss the 1971 *Cohen* case, which I think should govern all expression, including sexual expression, in all media, including broadcast.

The *Cohen* case arose during the Vietnam War and upheld Paul Cohen's First Amendment right to wear a jacket, inside a courthouse, on which he had written a message that was very offensive to many people, not only because it contained the four-letter F-word, but also because of his larger message. Specifically, Paul Cohen's jacket proclaimed: "Fuck the draft." The majority opinion that upheld Paul Cohen's right to display this provocative message was written by the much-respected Justice John Marshall Harlan. Notably, Harlan was a conservative Republican, who had been appointed by a Republican president.⁶⁸ I stress these facts again to underscore the key point I made earlier: strong support for freedom of speech cuts across party and ideological lines.

Many conservatives want to limit government power over our private lives, leaving decisions about what we say, what we see and hear, and what our own young children see and hear, up to us, instead of letting the government dictate these choices for us. This free-speech approach is not only consistent with individual liberty; it also benefits society as a whole because it permits the lively exchange of ideas and free flow of information that improve democratic decision-making.

Justice Harlan's opinion for the Court in the *Cohen* case well captures both of these essential benefits of protecting offensive expression, the benefits to individual and society alike:

The . . . right of free expression . . . is designed to remove governmental restraints from . . . public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that . . . such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the . . . individual dignity and choice upon which our political system rests.⁶⁹

In essence, to quote another old saying: different strokes for different folks. In our wonderfully diverse society we all have widely divergent ideas, values, and tastes concerning what expression is offensive and what is not. Therefore, if we allowed government to regulate or punish any speech that any person or group considered offensive, we would have little speech left. As the *Cohen* Court put it, "One [person's] vulgarity is another [person's] lyric."⁷⁰

I once saw a cartoon that captures this point. It shows three people in an art museum looking at a classic nude female torso, a fragment of an ancient sculpture minus limbs. Each viewer's reaction is shown in an air bubble. The first one thinks, "Art!" The second thinks, "SMUT!" The third thinks, "An insult to amputees!"

Sexuality is an especially personal area; our views about it are even more subjective than in other areas. Thus, the government is especially wrong to take away our individual right to choose concerning sexual expression. We cannot delegate to any government official—or anyone else for that matter—the deeply personal choices about which such expression we, and our own young children, will see or not see. Unfortunately, when it comes to sexual expression, and only sexual expression, the Supreme Court has ignored all of the time-honored teachings of the *Cohen* case, and it has allowed government to punish one person's lyric just because it is another person's vulgarity.

III. Judge-created speech-suppressive doctrines to "justify" restrictions on sexual expression

In the area of sexual expression, the Supreme Court has unfortunately deviated from all of the general free-speech principles I have laid out, which have worked so well regarding speech with every other kind of content. The Court has allowed sexual expression to be singled out for regulation, and even outright banning, based only on its content. The Court has allowed sexual expression to be suppressed just because it is considered offensive by the majority of community members, elected officials, appointed FCC commissioners, or jury members.

The Court has not demanded any evidence that such expression causes any adverse impact at all, let alone a clear and present danger of great tangible harm that cannot be averted through any measures besides censorship. The great weight of the pertinent scholarship documents that there is no such evidence.⁷¹ To the contrary, there is substantial evidence, which the Court has ignored, that the targeted sexual expression has many *positive* impacts, including for minors (at least older minors). Among other things, such expression provides valuable information about safer sex, contraception, and sexual orientation that promotes young people's health—and indeed can even be life-saving—given the rampant spread of HIV and other sexually transmitted diseases among teenagers, as well as the tragic spate of suicides among LGBT youth.⁷²

The Court has created three major doctrines under which it permits suppression of sexual expression. One of these permits government to completely outlaw or criminalize some sexual expression, which the Court labels “obscenity.” The other two doctrines permit government to strictly regulate other sexual expression in two contexts: the broadcast media⁷³ and adult entertainment establishments.⁷⁴ To distinguish this kind of restricted expression from the wholly banned category of obscenity, the Court usually calls such expression “indecenty.”

Obscenity

The very first time the Supreme Court considered whether sexual expression should be protected by the First Amendment’s Free Speech Clause, the Court actually extolled the importance of such expression. In 1957, in a case called *Roth v. United States*,⁷⁵ the Court made what is probably its least controversial statement ever: “Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is . . . of . . . vital . . . human interest and public concern.”⁷⁶ But no sooner had the Court said this than it proceeded to carve out from sexual expression a category that it held to be completely beyond the constitutional pale, labeling this pariah category “obscenity.” This judge-made obscenity exception has been opposed by most constitutional scholars and by many Supreme Court Justices, including the very Justice who initially created it but who subsequently recanted that ruling. This exception was even opposed by a distinguished commission of academic experts that President Lyndon Johnson appointed way back in 1968.⁷⁷ Along with similar commissions in other countries,⁷⁸ these experts recommended constitutional protection for all sexual expression for all consenting adults.

In the 1973 case, *Paris Adult Theatre v. Slaton*, the whole Court acknowledged that “there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society.”⁷⁹ Nonetheless, five Justices—a bare majority—asserted that such material could still be banned based on what they unabashedly called “unprovable assumptions” about its negative impacts on the moral “tone” of “a decent society.”⁸⁰ Consistent with this rationale, the core of the Court-created obscenity concept states that local communities may ban material if they deem it to be “patently offensive.”

Since that 1973 case, the Supreme Court has never again revisited the basic question of whether it should continue to enforce the obscen-

ity exception to the First Amendment. However, in its free-speech jurisprudence since 1973, the Court has generally moved toward stronger and stronger enforcement of the fundamental content-neutrality principle, and it has even enforced that principle concerning sexual expression in many contexts other than the obscenity doctrine. Therefore, I believe that when the Court does finally revisit the obscenity exception, there is a strong chance that it will reject that exception altogether.

For many decades, the Supreme Court has tried but failed to come up with clear, objective standards for defining constitutionally unprotected obscenity. The most famous line in the Court’s unsuccessful effort to define obscenity came from former Justice Potter Stewart when he candidly admitted, “I cannot define it, but I know it when I see it.”⁸¹ The problem, though, is that every judge, along with everyone else, sees a different “it”! Individuals even have different perspectives about whether any given expression has any sexual content at all. This is captured by the old joke about the man who sees every inkblot his psychiatrist shows him as wildly erotic. When his psychiatrist says to him, “You’re obsessed with sex,” the man answers: “What do you mean I am obsessed? *You* are the one who keeps showing me all these dirty pictures!”

Given our especially subjective views about the inherently personal realm of sex, this definitional problem persists no matter what sexual expression is targeted, under any rubric or any rationale. For example, as I have already noted, some feminists decry sexual expression that they view as demeaning or degrading to women. To distinguish this sexual expression from the long-established concepts of “obscenity” and “indecenty,” they label it with the stigmatizing term “pornography.” In contrast, these anti-porn feminists use the term “erotica” for sexual expression that they do not deem degrading to women. How can you tell the difference, you might well ask? Well, as one feminist anti-pornography activist put it: “What turns *me* on is erotica; but what turns *you* on is pornography!”⁸²

As the Supreme Court has recognized, freedom of speech is especially endangered whenever the government bans or regulates speech under broad, vague, subjective concepts such as “offensive.”⁸³ Therefore, as I have repeatedly stressed, the Court has consistently invalidated censorship of non-sexual expression that targets “offensive” expression. Moreover, in the landmark 1997 case of *Reno v. ACLU*,⁸⁴ the Court struck down a federal law that censored sexual expression online, specifically because the law targeted “patently offensive” expression—a concept that the Court held to be overly broad and vague. This rul-

ing is a key basis for my optimism that the Court will also repudiate both the obscenity doctrine and its old holdings allowing regulation of broadcast "indecent," because the definitions of both "obscenity" and broadcast "indecent" center on the "patently offensive" criterion.⁸⁵ Such vague concepts as "offensive" or "patently offensive" present a fundamental problem because they do not provide any clear, objective guidelines. These words allow police, prosecutors, and other enforcing officials to exercise their unfettered discretion according to their own subjective tastes or those of politically powerful community members. Consequently, the enforcement patterns will be arbitrary at best, discriminatory at worst. The situations that lead to particular expression being deemed offensive or obscene will be completely unpredictable.

This causes what courts call a "chilling effect"⁸⁶ because no one wants to run the risk of criminal prosecution. In other words, people self-censor and do not engage in expression just because it could be deemed offensive by the powers that be. That self-censorship not only violates the free-speech rights of all those who were deterred from speaking for fear of prosecution, but it also deprives the rest of us of the chance to hear valued expression, including constitutionally protected speech. The completely arbitrary, unpredictable nature of our current legal approach can best be illustrated by citing some recent examples of the FCC's enforcement of its broadcast indecency rules against particular words. I will simply list some of the contrasting rulings that the FCC issued in a single order. It held that "bullshit" *was* indecent, but that "dick" and "dickhead" were *not*. It held that non-explicit suggestions of teenagers' sexual activity in general *were* indecent, but that explicit discussions of specific teen sexual practices were *not*. It held that "fuck 'em" *was* indecent, but that "up yours" and "kiss my ass" were *not*.⁸⁷ As I noted above, the FCC also held that musicians' uses of "fuck" and "shit" in Martin Scorsese's documentary film about blues music *were* indecent. In contrast, it held that actors' uses of the very same words in the fictional film *Saving Private Ryan* were *not*.⁸⁸

In response to these erratic rulings, no wonder we have seen so much self-censorship! The unfettered discretion involved in enforcing such vague concepts as "indecent," "offensive" or "obscene" is likely to be exercised in a manner that is not only arbitrary, but even worse, discriminatory, by singling out expression that is produced by or appeals to individuals or groups who are relatively unpopular or powerless. Indeed, recent obscenity prosecutions have targeted expressions of lesbian and gay sexuality⁸⁹ as well as rap music by young African-American men.⁹⁰

Indecency

In addition to the obscenity concept, which allows the complete criminalization or banning of certain sexual expression, the Supreme Court also has allowed strict regulation of other sexual expression—usually called "indecent"—in two contexts. First, the Court has allowed such expression to be barred from the broadcast airwaves during the time when many minors are assumed to be in the audience, from 6 A.M. to 10 P.M.⁹¹ Second, the Court has allowed businesses that purvey such expression to be subjected to strict zoning laws. For example, adult bookstores and strip clubs may be exiled to outlying areas of cities or clustered together in a "red light district."⁹² Along with the obscenity exception, these indecency doctrines violate core free-speech principles and have been harshly criticized by many experts, including dissenting Justices.⁹³

I am going to discuss in more detail only the first of these two indecency doctrines—indecent in broadcasting—since it is of more pervasive concern. Just as the Court's last decision that examined and upheld the obscenity exception is more than 30 years old, the same is true of the Court's last decision that examined and upheld the government's power to restrict broadcast indecency. That decision, in *Pacifica v. FCC*,⁹⁴ which I noted above, upheld the FCC's power to punish Pacifica Radio for its daytime broadcast of George Carlin's famous "7 Dirty Words" monologue. The *Pacifica* case was decided by a razor-thin 5–4 ruling, and since then, it has been criticized by many other Justices.⁹⁵ Again, this parallels the Court's 1973 ruling upholding the obscenity exception, which also was decided 5–4 and has since been criticized by many other Justices. Moreover, *Pacifica* relied on factual premises about the nature of broadcasting which—even if they were correct at the time—are certainly no longer valid today. Specifically, the majority stressed what it called the "uniquely pervasive nature of broadcast expression" and its unique accessibility to young people.

Even if these factual conclusions were correct in 1971, they are certainly no longer true, given the subsequent explosion of so many other media, which are at least as accessible to young people as broadcast television, and which the Court has held to be immune from special regulation, consistent with the First Amendment.⁹⁶ Yet, broadcasters can still be severely fined, or even lose their broadcasting licenses, even though the very same expression is completely insulated from regulation on the very next channel if the next channel happens to be cable, rather than broadcast. Surely it is past due time to end the second-class treatment

of the broadcast media along with the second-class treatment of sexual expression.

IV. Recent positive developments and ongoing law reform initiatives

That brings me to my fourth and final point: my positive prognosis about ending, or at least reducing, both kinds of disparity. As Woody Allen once told an audience: "I'd like to end with something positive, but I can't think of anything positive to say. Would you settle for two negatives?"⁹⁷

I actually have many positives, but I will confine myself to the three that I consider the most important. First, in the recent past, the Supreme Court has strongly enforced the principle of content-neutrality even for the traditionally disfavored category of sexual expression. Therefore, I am cautiously optimistic that when the Court finally re-examines its current obscenity and indecency doctrines head-on, as it has not done for decades, it will reject these doctrines as completely inconsistent with the core content-neutrality principle. Second, the Court's landmark 2003 decision that strongly protects sexual *conduct*, *Lawrence v. Texas*,⁹⁸ also provides additional constitutional rationales for protecting sexual *expression* even beyond the free-speech content-neutrality principle. Third, the federal courts right now are re-examining the old cases that have rationalized suppression of broadcast "indecency," which is the first time they have done this in several decades, and the signs so far are encouraging.

Now I will expand a bit on that first positive development: the Court's recent strong enforcement of the core content-neutrality principle,⁹⁹ even concerning sexual expression. In a consistent line of cases, the Court has struck down restrictions on sexual expression in all new media, despite the government's arguments that these media should be relegated to the same second-class status as broadcast. The government has argued that the Court should use the same rationale that it used to uphold such broadcast restrictions back in the 1971 *Pacifica* case: namely, to shield children from "indecent" sexual expression they can easily access on these media. Although the Court has not yet directly overturned *Pacifica*, in every subsequent case it has read that precedent very narrowly and it has reached the opposite conclusion concerning every other medium it has considered. Accordingly, the Court has rejected restrictions on sexual expression on telephones (in the context

of Dial-A-Porn);¹⁰⁰ on cable TV;¹⁰¹ and on the Internet.¹⁰² These decisions have been widely supported by Justices across the ideological spectrum and have been based on a robust concept of free speech that is completely at odds with the current obscenity and indecency doctrines.

The majority opinions in these recent cases have not expressly overruled any earlier cases, but I agree with the dissenters that the majority's rationales are inconsistent with prior precedents that did allow regulation of broadcast for the sake of shielding minors.¹⁰³ For example, in the most recent of these cases, involving cable TV, what the dissent stated as a reason to condemn the majority's ruling is to me a reason to praise it. Specifically, the dissent refers to what it sees as Congress's legitimate power to "help . . . parents . . . keep[] unwanted [sexual expression] from their children," and it then complains that "the Court reduces Congress's protective power to the vanishing point."¹⁰⁴ Hear, hear!

The second major positive development is the Supreme Court's historic 2003 decision in *Lawrence v. Texas*. Not only did the Court strike down the statute at issue—Texas's discriminatory ban on same-gender "sodomy" (oral or anal sex), but the Court also based its holding on broad-ranging rationales. Accordingly, this ruling should sound the death-knell for other laws that restrict other personal, private conduct by consenting adults, including their production or consumption of sexual expression. Most importantly, the Court reversed its infamous 1986 decision in *Bowers v. Hardwick*,¹⁰⁵ which had held that government may criminalize private, consensual adult conduct merely because the majority of the community disapproves of the conduct. That outdated concept reminds me of H.L. Mencken's famous definition of Puritanism: "the haunting fear that someone, somewhere, may be happy!"¹⁰⁶

I cannot think of any supposed justification for criminal laws that is more antithetical to individual liberty. John Stuart Mill, in his classic 1859 essay, "On Liberty," said it best when he wrote, "Over himself, over his own body and mind, the individual is sovereign . . . [T]he only purpose for which government may rightfully exercise power . . . over anyone is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."¹⁰⁷

The Supreme Court's opinion in *Lawrence v. Texas* contains language that celebrates a similarly broad concept of individual freedom of choice, and I find this especially exciting, given that it was written by Justice Anthony Kennedy, a conservative, Republican Catholic, who was appointed by a conservative, Republican president, Ronald Reagan,¹⁰⁸ and who is the key swing vote on the current Court.¹⁰⁹

One aspect of the *Lawrence* decision is of special significance in the ongoing effort to un-censor sexual expression. In overturning *Bowers*, the Court expressly held that laws cannot constitutionally be based only on majoritarian views about morality. This holding provoked a fierce tirade in Justice Scalia's strident dissent. He rightly recognized that this holding should doom a whole host of laws, far beyond the discriminatory anti-sodomy laws that were at issue in *Lawrence* itself. While this sweeping potential was the cause of Justice Scalia's consternation, for civil libertarians, it is cause for celebration! He wrote (emphasis mine):

State laws [that are only based on moral choices include laws] against . . . nude dancing, same-sex marriage, prostitution, masturbation . . . fornication, and *obscenity* . . . Every single one of these laws is called into question by today's decision . . . This [decision] effectively decrees the end of all morals legislation.¹¹⁰

As I previously detailed, the 1973 Supreme Court decision upholding the obscenity exception reasoned that this exception was justified to preserve the "moral tone" of the community. Therefore, Justice Scalia was absolutely right in his *Lawrence* dissent when he said that the majority's rationale would warrant overturning the obscenity exception. In fact, one lower court ruling has held precisely that *Lawrence* does spell the death-knell for anti-obscenity laws. In that important ruling, federal judge Gary Lancaster, citing *Lawrence*, wrote, "Obscenity statutes [unconstitutionally] burden . . . individuals' fundamental right to possess, read, observe, and think about what [they] choose[] in the privacy of [their] own home."¹¹¹

While an appellate court overturned that ruling,¹¹² it did not do so because it disagreed with Judge Lancaster's reading of *Lawrence*. Rather, the appellate court said that only the Supreme Court itself should directly apply its *Lawrence* holding to the obscenity context.¹¹³ I am cautiously optimistic that, before long, the Supreme Court will do just that.

The third and final major positive development I will address is current litigation challenging the longstanding restrictions on broadcast "indecentcy." The silver lining to the cloud of the recent crackdowns on such expression is that they have spurred all the major broadcasters to unite in a frontal challenge to them. Moreover, many "friend of the court" briefs have been filed by many diverse opponents of the current repressive regime, including the one I mentioned earlier—none other

than former FCC officials, one of whom had actually worked on the *Pacifica* case. That brief went so far as to call for a complete end to the regulation of broadcast indecency, as violating the First Amendment. The brief's ringing conclusion read:

It is time to put an end to this experiment with indecency regulation . . . [I]t has [led to] a revival of Nineteenth Century Comstockery. As former regulators we appreciate that the FCC is in an uncomfortable position, buffeted by the turbulent passions of moral zealots and threats from over-excited Congressmen. But that is precisely why the matter must be taken out of the agency's hands entirely.¹¹⁴

In 2009, in *Fox v. FCC*,¹¹⁵ the Supreme Court postponed addressing any of the fundamental constitutional questions about the increasingly anomalous second-class status that broadcast expression receives under the First Amendment. Instead, the Court narrowly ruled that the FCC did not violate administrative law principles when it recently reversed its own longstanding policy and began to sanction even "fleeting" or "isolated" expletives, including just a single four-letter word spontaneously uttered during a live performance. The Supreme Court reversed the Second Circuit's holding that the FCC had not adequately explained this policy change, and the high Court remanded the case for further proceedings.¹¹⁶ Just as this chapter was going to press, on July 13, 2010, a three-judge panel of the U.S. Court of Appeals for the Second Circuit issued an opinion on remand that unanimously struck down the FCC's policy as violating the First Amendment. The court stressed a theme that this chapter also has highlighted: that the policy's vagueness creates a chilling effect that stifles much valuable expression.¹¹⁷

In the Supreme Court's 2009 *Fox* ruling, several of the Justices' opinions noted the unresolved First Amendment issues that would have to await future rulings by the Court. Indeed, as Justice Scalia's majority opinion observed, the Supreme Court would "perhaps" address these First Amendment issues at a later stage "in this very case."¹¹⁸ In light of the Second Circuit's recent ruling, Justice Scalia's prediction seems likely to be fulfilled. Given the suppressive impact of the FCC's sweeping new concept of broadcast "indecentcy," it was disappointing that the Supreme Court in its 2009 *Fox* decision deferred ruling on the weighty First Amendment challenges to that concept. However, it was heartening that five Justices used their opinions to signal their sympathy to these challenges. Justice Thomas was the most critical, reiterating a point that he has made before, and calling into question the Court's prior rulings

that permit more content regulation of broadcast than other media.¹¹⁹ In addition, four other Justices indicated their receptivity toward First Amendment challenges: Justices Stevens,¹²⁰ Kennedy,¹²¹ Ginsburg,¹²² and Breyer.¹²³ Accordingly, I remain optimistic that the high Court will ultimately agree with the Second Circuit's recent forceful condemnation of the policy's sweeping censorial impact:

[T]he absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all "patently offensive" references to sex, sexual organs, and excretion without giving adequate guidance as to what "patently offensive" means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.¹²⁴

In closing, I would like to share a passage from an opinion by former Supreme Court Justice William O. Douglas, who sat on the Court from 1939 to 1975 and who always dissented from all of the Court's cases denying full First Amendment protection to sexual expression.¹²⁵ This passage reflects Douglas's travels to Communist countries during the then-ongoing Cold War and it perfectly captures the First Amendment philosophy that should spell the end of sexual expression's second-class treatment. Justice Douglas wrote:

'Obscenity' . . . is the expression of offensive ideas. There are regimes in the world where ideas "offensive" to the majority . . . are suppressed. There life proceeds at a monotonous pace. Most of us would find that world offensive. One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and . . . religion. I am sure I would find offensive most of the [material] charged with being obscene. But in a life that has not been short, I have yet to be trapped into seeing or reading something that would offend me. . . . [O]ur society . . . presupposes that the individual, not government, [is] the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment.¹²⁶

Notes

1. This is a lightly edited version of oral remarks that Nadine Strossen delivered on March 3, 2007 (Keynote Address, University of Iowa, The 2007 Obermann Center for Advanced Studies, Humanities Symposium, "Obscenity: An Interdisciplinary Discussion"). It has been edited for the following purposes: (1) to convert it from oral speech format to essay format; (2) to add footnotes; and (3) to update it in terms of major pertinent developments between when the speech was delivered and when the published version was completed (July 2, 2010). Most of the work on these revisions was done by Professor Strossen's Senior Faculty Assistant Steven Cunningham (NYLS 1999) and her Research Assistant Trevor Timm (NYLS 2011).

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6. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

7. See *R. A. V. v. St. Paul*, 505 U.S. 377 (hate speech); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamatory falsehoods about government officials); and *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocacy of violence and lawbreaking).

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23. *American Civil Liberties Union v. Gonzales*, 478 F. Supp.2d 775, 821 (E.D.Pa., 2007).

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